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Lessons To Be Learned: The Conflict in International Antitrust Law Contrasted With Progress in International Financial Law

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NOTE

LESSONS TO BE LEARNED: THE CONFLICT IN INTERNATIONAL ANTITRUST LAW CONTRASTED WITH PROGRESS IN INTERNATIONAL FINANCIAL LAW

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INTRODUCTION

The international community has varying approaches to the divergent fields of antitrust law and financial law. These numerous approaches are either procedural or substantive. [1] Nations adopt rules based on their specific common law and their policy on trade.[2] As a result, when principles of law and the ideologies of politicians and economists in different countries conflict, monopolists and securities law violators can escape the grasp of enforcement agencies.

International antitrust law, however, involves a different set of regulations and regulatory agencies than international financial

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1. *See generally* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343, 400-01 (1997) (arguing that, in the field of international antitrust law, procedural and substantive issues follow similar patterns because they are interconnected).

2. *See* Spencer Weber Waller, *The Decline of the Nation State and Its Effect on Constitutional and International Economic Law: Contribution: National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1122 (1996) (discussing the competing ideologies of the United States Trade Representative office and the European Commission, the former advocating using antitrust to resolve trade disputes and protect American companies and the latter pursuing efforts to harmonize international antitrust law).

law. U.S. corporations that engage in international business demand that the major domestic antitrust authorities, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), increase measures to end anticompetitive behavior by foreign companies in foreign nations that effects U.S. profits from international trade. [3] Both agencies, however, maintain that they apply American antitrust law based on what is efficient and fair for our economy and the global economy. [4] Yet, others contend that the agencies are often vehicles for the expansion of American trade and products into foreign markets. [5]

The result of these competing interests is multiple policies, which in turn produce multiple statutes and antitrust guidelines that the DOJ and FTC must enforce. On one end of the spectrum is the principle of extraterritorial action, where the U.S. courts or agencies reach out and punish violators of U.S. antitrust law who are located in other nations. If anticompetitive behavior affects the U.S. economy, regardless of whether the act occurred outside the U.S. or involved foreign nationals, U.S. courts can exercise subject matter jurisdiction. [6] The modern reflection of this idea, the "effects" doctrine, [7] is embodied in the 1995 Antitrust Enforcement Guidelines for International Operations ("Guidelines"), [8] a joint

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3. *See* American Bar Association, *Recommendation and Report on the Application of Competition Law and Principles and Policies in the International Trade Area*, 29 INT'L L. 945 (1995).

4. *See Prepared Statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the House Committee on the Judiciary*, FED. NEWS SERVICE, Apr. 12, 2000 [hereinafter Prepared Statement of Joel I. Klein] (stating the U.S. reluctance to accepting foreign procedural law due to a lack of enforcement by foreign agencies). The Bush Administration appointees have yet to explain their position on procedural antitrust law as of the final draft of this Note.

5. *See, e.g.*, Robert Rice, *Rebuff for U.S. over Antitrust Stance – Draft Guidelines on Jurisdiction Outside the Country are Unpopular with Other Governments*, FIN. TIMES (London), Mar. 7, 1995, at 12.

6. United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416, 444 (2d Cir. 1945) (on cert. from United States Supreme Court due to lack of quorum).

7. *Id.*

8. U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (Guidelines), Apr. 5, 1995.

creation of the FTC and DOJ.

The opposite view, regarding antitrust law, is grounded in the principle of comity. This concept aims at recognizing the sovereignty of other nations' systems of law and balances those laws against the rights of one's own nation. [9] Such cooperation has resulted in the creation of Mutual Legal Assistance Treaties ("MLATs"), which focus on criminal law enforcement in general, whether it be over antitrust violations or penal law violations. [10] These treaties allow two or more nations to share investigative information through provisions outlining modes of requesting and delivering evidence and witnesses between two nations. [11] Unfortunately, in most countries, antitrust violations fall under civil law, not criminal law, and thus are not under the purview of MLATs. [12] The International Antitrust Enforcement Assistance Act ("IAEAA")[13] was designed to remedy this situation by negotiating bilateral treaties between other nations that provide for reciprocal assistance on antitrust matters. [14]

The goals of extraterritorial action and cooperation are clearly at odds. Yet, the FTC and DOJ practice both daily while looking at the international community with a straight face. As one commentator asserted, cooperation is the "velvet glove," emphasizing reason, if not harmonization, of enforcement. [15] If a

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9. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); *see also* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 937 (D.C. Cir. 1984).

10. *See* Charles S. Stark, *Jurisdiction and Enforcement: International Cooperation in the Pursuit of Cartels*, 6. GEO. MASON L. REV. 533, 537 (1998) (explaining past prosecution efforts between the U.S. and Canada, the U.S. and European Union, as well as the substantive laws used between nations to prosecute cartels).

11. *Id.*

12. International Antitrust Enforcement Assistance Act of 1994, 103d Congress, 2d Session, 103 H. Rpt. 772 (an example of a nation where antitrust matters do not fall under the purview of the criminal law is Japan).

13. International Antitrust Enforcement Assistance Act of 1994 § 1-13; 15 U.S.C. § 6201-12 (2000).

14. *See generally* Laraine L. Laudati and Todd J. Friedbacher, *Trading Secrets – The International Antitrust Enforcement Assistance Act*, 16 NW. J. INT'L L. & BUS. 478, 479 (1995) (providing a comprehensive explanation of each section of the IAEAA and the immediate events leading up to it).

15. *See* Joseph P. Griffin, *Sovereignty Revisited: Regulation of Competition in*

nation fails to conform to the United States' procedural tactics, the iron fist of extraterritorial action will smash the laws of the nation, come and get a violator wherever he or she resides, put them in prison or bankrupt the nation's valuable company. [16] The approach is inconsistent and threatening. Foreign nations have responded negatively by ignoring pleas for cooperation, even blocking U.S. attempts at securing information.[17]

Regulation of financial law, in comparison, has taken a decidedly different path. Financial risks and practices are now often pooled together, especially within the same company, and those practices stretch across many borders. [18] Rapid innovation in products and services across borders is met by strict regulations. [19] This globalization has to lead to increased and more efficient communication, cooperation, and coordination among bank supervisors and securities regulators on an international basis. [20] "Functional regulation" is the phrase associated with an international convergence of regulatory and supervisory standards

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the Canada/U.S. Context, Extraterritorial Reach of U.S. Antitrust Law – A U.S. Perspective, 24 CAN-U.S. L.J. 315 (1998) (showing the unlikelihood of an international antitrust code in light of the U.S. desire to exercise its laws, extraterritorially, at will).

16. *Id.*

17. *See* Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 298-302 (1993) (explaining various types of statutes that block U.S. attempts at discovery and judgment in Canada, Korea, Japan, and Australia—so-called "blocking statutes").

18. *See* Joseph J. Norton, *Tribute: "International Financial Law," An Increasingly Important Component of "International Economic Law": A Tribute to Professor John H. Jackson*, 20 MICH. J. INT'L L. 133, 138-139 (1999) (describing the development of international financial law, especially in light of the emergence of international regulatory bodies in securities regulation, banking law, disclosure of corporate and financial documents, and insider trading).

19. *See generally* JOHN H. JACKSON, REGULATORY INTERNATIONAL ECONOMIC BEHAVIORS – REFLECTIONS ON THE BORDER SETTINGS OF INTERNATIONAL FINANCIAL MARKETS AND INSTITUTIONS, IN EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS, 3 (J.J. Norton and M. Andenas eds. 1996).

20. Norton, *supra* note 18, at 140.

of nations, governing securities firms and banks. [21] Domestic regulatory agencies (most notably in the U.S., the Securities and Exchange Commission ("SEC")) often act independently of their government and with private actors through Memoranda of Understanding ("MOU"), a tool similar to an antitrust MLAT. [22]

In some fields of international law, the convergence toward international standards has already begun, while in others, it has been delayed by claims of sovereignty and power. The territorial model of sovereignty is becoming an elastic notion of jurisdiction based on effects on different nations, not just the place of conduct.[23] Two approaches have been taken to harmonize security markets: cooperation and reciprocity. [24] It must be noted that although these approaches are recognized in international antitrust law as well, that field has not yet realized the goal of harmonization of procedural and substantive standards. Cooperation in the financial field of disclosure, for example, attempts to find a common set of regulations, especially a standardized disclosure statement. [25] Reciprocity, another tool, seeks mutual recognition by one country of another's set of documents or laws in return for the second country meeting minimum standards. [25] Since there are no international regulators in most financial fields, harmonization through reciprocity might be easier to achieve—reluctant nations like the U.S. are compelled to accept one nation's standards at a time through this model, instead of a set of standards for dealing

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21. *Id.*

22. *See* Kanishka Jayasuriya, *The Rule of Law in the Era of Globalization*, 6 IND. J. GLOBAL LEG. STUD. 425, 429 (1999) (discussing the validity of MOUs and MLATs in establishing clear rules for multinational corporations concerned with dealing with multiple regulators in the fields of securities regulation and banking).

23. *Id.*

24. *See* Marc I. Steinberg and Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 236 (1999) (analyzing the opinions of international advisory bodies, and how nations have positively responded to these proposals, leading toward recent reciprocal/"progressive" agreements).

25. *See* Manning Gilbert Warren, *Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 191 (1990).

26. *Id.*

with all nations. [27] However, if the U.S. ignores the goal of harmonization when joining into reciprocal or cooperative agreements, whether financial or antitrust, the agreements are moot.

The validity and worth of the IAEAA, a reciprocal antitrust agreement, must be questioned in this climate. Indeed, on the day President Clinton signed the IAEAA into law, Japanese governmental officials revealed they had no intention of sharing information with the U.S. pursuant to the IAEAA. [28] Is the IAEAA a valued tool in the grand strategy of U.S. international antitrust policy, as the FTC and DOJ now argue it to be, [29] or is it merely a ploy to satiate the international community while the U.S. continues to refuse to agree on reforming our substantive and procedural law to reconcile with international concerns? Further, has the U.S. followed a similar path of capitulation in international financial law, or have real strides been made toward harmonization in that field? Unless harmonization on international procedural and substantive antitrust law can begin, the IAEAA may be a largely ineffective act with no real chance of international acceptance and is merely another piece of aggressive U.S. international trade policy. The lesson learned from the development of international financial law over the last few decades could provide resolution to this debate.

This Note contrasts the conflict between the United States' two divergent policies on international antitrust law, and how the policies cannot be reconciled, with our relatively progressive move toward harmonization in international financial law. Part I sets forth the status of international antitrust law prior to the IAEAA, and then examines the provisions of the IAEAA and the 1995 Guidelines. This is followed by a brief examination of four major areas of international financial law: securities regulation, banking law, insider trading, and disclosure. Part II examines the conflict the Guidelines and the IAEAA create internationally, as compared to similar conflicts and dissimilar resolutions in international financial law. Part III argues that the IAEAA was

27. Steinberg & Michaels, *supra* note 24, at 237.
28. *Japan May Resist U.S. Overtures*, BUS. L. EUR., Nov. 2, 1995.
29. Prepared Statement of Joel I. Klein, *supra* note 4.

unlikely to succeed from the start, and that the FTC and DOJ either ignore or readjust their views on its practical use. Agreements in most financial areas, most notably disclosure, where reciprocal agreements are now encouraged by the U.S., are generally and necessarily moving toward harmonization. It also suggests that a move towards harmonization on specifics of antitrust law could prevent further damage.

I. THE IAEAA AND THE 1995 GUIDELINES AS THE PRODUCT OF A CENTURY OF SHERMAN ACT JURISDICTION, IN COMPARISON TO THE CONSTANTLY EVOLVING STATE OF INTERNATIONAL FINANCIAL LAW

A. The State Of International Antitrust Law

The IAEAA is the latest in a century's worth of U.S. involvement in international antitrust law, dating back to initial applications of the Sherman Act. [30] The extent to which Sherman Act jurisdiction should apply internationally, both procedurally and substantively, still has not been settled. In the early 20th Century, few nations, including developed Eastern European countries, had antitrust laws, and those who did were not vigilant in prosecuting overseas cases. [31] The U.S. gained procedural direction with a justification for the extraterritorial doctrine in 1945 with *United States v. Aluminum Co. of America* ("Alcoa"). [32] That rationale is known as the "intended effects doctrine." [33] In *Alcoa*, the Second Circuit held that U.S. courts and agencies could assert claims against conduct occurring outside their borders as long as the act intended to effect and did affect U.S. commerce. [34] The Supreme Court refined this approach to extraterritorial action in

30. 26 Stat. 209 (1890) (codified as amended, 15 U.S.C. § 1-7).

31. Stark, *supra* note 10, at 536.

32. 148 F.2d 416, 444 (2d Cir. 1945).

33. *Id.*

34. "[I]t is settled law...that any state may impose liabilities, even upon persons not within its border which the state reprehends; and these liabilities other states will normally recognize." *Id.* at 443-44.

Hartford Fire Insurance Co. v. California. [35] International comity, a valid defense up until *Hartford Fire*, was devalued when the Court ruled that any substantial effect on U.S. commerce outweighed comity absent a "true conflict" with another nation's law.[36]

Foreign nations balked at the effects doctrine on procedural and substantive grounds. The extraterritorial approach allows U.S. courts to expand their jurisdiction by finding that a wide range of conduct has a substantial effect on U.S. commerce. [37] Further, through applying U.S. substantive law to foreign companies and nations, foreign nationals have been prosecuted for violations of U.S. law—even when the foreign nation that companies are located in do not even recognize those violations as crimes. [38]

International antitrust cooperation agreements were few and far between after *Alcoa.* [39] Most arrangements consisted of the U.S. fighting to stop a cartel hurting domestic companies' ability to penetrate foreign markets; in turn, the nation wherein the cartel was located demanded concessions for aid in that fight. [40] The U.S. refused these demands, instead pushing forward the policy of extraterritoriality. [41] Soon after *Alcoa*, the U.S. pursued many international cartels and vertical restraints, notably involving former Axis powers that excluded U.S. business from those Western European and Japanese markets. [42] Angered nations formed blocking statutes as a reaction to assertions of jurisdiction inside their borders. [43] Blocking statutes prohibit compliance with

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35. 509 U.S. 764 (1993).

36. *Id.*

37. Chang, *supra* note 17, at 296.

38. *See* George W. Haight, *International Law & Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 654.

39. *See generally* Terry Calvani, *Business and Law: Long Arm of U.S. Regulations*, FIN. TIMES (London), Oct. 25, 1994 (analyzing why the U.S. would implement the Guidelines if other nations have always fumed over such an extraterritorial approach).

40. Stark, *supra* note 10.

41. *Id.*

42. Waller, *supra* note 2.

43. Gary E. Dyal, Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1065, 1081 (1984-85).

U.S. court order, verdicts, and FTC and DOJ investigative requests. [44] "Claw-back" provisions, allowing for actions to reduce damages awarded by U.S. courts, respond to the treble damages awarded under U.S. antitrust law. [45]

At the same time, the U.S. fostered the seeds of cooperation with some nations. The earliest sign, the "Fulton-Rogers Understanding," an oral agreement between the U.S. and Canada, allowed the two nations to notify each other whenever one would engage in an investigation which might hurt the other's interests. [46] A formal Memorandum of Understanding was negotiated between the two nations in 1984, ensuring that the U.S. would take comity into its analysis when starting an investigation, in return for Canada limiting the use of its blocking statues. [47] The real breakthrough, however, occurred one year later with the 1985 MLAT between the U.S. and Canada, which included antitrust as one of the areas of criminal law where the parties would assist each other in investigative matters. [48] This MLAT has been successful in cross-border investigations of the thermal fax paper industry [49] and the plastic dinnerware industry. [50]

Another major antitrust agreement occurred in 1991 between the U.S. and the European Union. [51] It included provisions on notification, consultation, comity, and even coordination of efforts.[52] An example of the results of that agreement occurred in

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44. *Id.*

45. *See* Chang, *supra* note 17 and accompanying text.

46. Stark, *supra* note 10.

47. *See Memorandum of Understanding as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Laws, U.S.-Can.*, Mar. 9, 1984, 23 I.L.M. 275 (1984).

48. *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Can.*, Mar. 18, 1985, 24 I.L.M. 1092 (1985).

49. *See U.S. and Canadian Prosecutors Attack Cartel Behavior By Fax Paper Distributors*, 67 ANTITRUST & TRADE REG. REP. (BNA) 108 (1994).

50. *See Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Arrangements*, 66 ANTITRUST & TRADE REG. REP (BNA) 661 (1994).

51. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, *reprinted in* 4 TRADE REG REP. (CCH) para. 13,504 (Sept. 23, 1991).

52. Stark, *supra* note 10.

1994, when the DOJ and the European Commission (EC) concluded a successful joint investigation of Microsoft. [53] The two parties have split, however, on the goals of international antitrust law. [54] The U.S. usually supports cooperation proposals from the Organization for Economic Cooperation and Development ("OECD"), which was founded in part by the U.S. after World War II to help implement the Marshall Plan. [55] OECD's most recent recommendation seeks a framework for international cooperation and enforcement, but no set code for conduct or enforcement. [56] The EU, recognizing that OECD proposals still allow for extraterritorial action at the U.S.'s whim, works mainly through the World Trade Organization (WTO) to establish an international code for some antitrust violations. [57]

Some courts recognized the EU and the WTO's position and attempted to soften the U.S. approach. The Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America* ("Timberlane"), [58] formed the "jurisdictional rule of reason" test, a multi-factor balancing test for determining jurisdiction. [59] Judge Raymond Choy, writing for the majority, pointedly rejected the effects doctrine. [60] He drew upon factors outlined in the Restatement

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53. *See Microsoft Settles Accusations of Monopolistic Selling Practices*, 67 ANTITRUST & TRADE REG. REP. (BNA) 106 (July 21, 1994).

54. *See generally* Dominic Bencivenga, *International Antitrust: Nations Respond to Greater Need for Cooperation*, N.Y.L.J., Oct. 23, 1997 (discussing the difference in the OECD and WTO approaches). The OECD is a consortium of nations, both from the Americas and Asia, which meet (at least) annually to propose measures member nations can use to combat anticompetitive activities domestically and internationally.

55. *Id.*

56. *See* Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95) 130/final (July 27 & 28, 1995), *available in* 35 I.L.M. 1314 (1995) (recommending "notification, exchange of information, co-ordination of action, consultation and conciliation" on a voluntary basis).

57. Stark, *supra* note 10.

58. 549 F.2d 597 (9th Cir. 1976), aff'd, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

59. *Id.* at 613-14.

60. *Id.* at 611-12 (stating that "the effects test by itself is incomplete because it fails to consider other nation's interests. Nor does it expressly take into account the full nature of he relationship between actors and this country.").

(Second) of the United States Foreign Relation Law ("Restatement") to delineate eight criteria to consider when weighing comity and sovereignty against whether there was an injury to a party in the U.S. due to the foreign conduct. [61] The factors included, most importantly, the degree of conflict with foreign policy or law, the extent to which enforcement by either state can be expected to achieve compliance, the extent to which there is explicit purpose to harm or affect American commerce, and the relative weight given said violations within the United States as compared with the degree of scrutiny attributed to the violations abroad. [62]

However, the Third Circuit ignored the trend towards recognizing comity when deciding procedural matters in *Mannington Mills, Inc. v. Congoleum Corp.* ("Mannington Mills").[63] The court held the effects doctrine to be the litmus test for jurisdiction, only factoring in comity considerations after asserting proper jurisdiction. [64] Finally, *Hartford Fire* adhered to *Alcoa*'s strict effects test. [65] It was a five-to-four decision based on its reading of the Restatement. [66] Subsequent to the decision, the author of the Restatement wrote a law journal article where he claimed the majority "misunderstood" the Restatement's position.[67] Justice Scalia, writing for the dissent, advocates a position similar to *Timberlane*, [68] a position which increased in

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61. *Id.* at 613 (stating that "there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.").

62. *Id.* at 614 (citing Restatement (Second) of Foreign Relations Law of the United States 40).

63. 595 F.2d 1287 (3d Cir. 1979).

64. *Id.* at 1296 (using the balancing test only after finding jurisdiction).

65. Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).

66. *See* Restatement (Third) of Foreign Relations Law of the United States 403 (1987) (available on file with the Journal of Corporate & Financial Law).

67. Andrew S. Lowenfeld, Comment, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995).

68. *See Hartford Fire Ins.*, 509 U.S. 764, 818 n.9 (1993) (Scalia, J., dissenting) (arguing that comity should be addressed during, not after, a jurisdictional

validity after the U.S. cooperative effort with Canada .[69]

Despite these considerations and the strong conflict between circuits and inside the Supreme Court itself, the FTC and DOJ pressed Congress for cooperative treaties to help in investigations, because in an expanding economy, more information is often found abroad.[70] The problem was that MLATs only works with nations that include antitrust violations as crimes; further, they are usually created for only one situation.[71] In the U.S. and in some other nations, cooperation in civil matters is limited by strict confidentiality and disclosure rules.[72] The agencies sought a vehicle for gathering and sharing confidential material, thereby getting the requests for information past blocking statutes, while simultaneously safeguarding them from public consumption.[73]

The two U.S. agencies devised the IAEAA as their solution.[74] The IAEAA entered Congress with the support of both political parties and the Clinton Administration, was drafted in consultation with the business community, and passed swiftly through Congress only ten weeks after its introduction.[75] IAEAA provides for voluntary bilateral cooperation only with nations who have agreed

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inquiry).

69. *See* Stark, *supra* note 46 and accompanying text.

70. *See* 140 Cong. Rec. S15021 (1994) (statement of Senator Thurmond) ("It is appropriate and necessary for our antitrust authorities to be given better tools for obtaining evidence abroad, because antitrust violations increasingly involve transactions and evidence which are located abroad or in more than one country.").

71. Waller, *supra* note 2.

72. *Id.* For instance, the U.S. cannot disclose materials obtained through Civil Investigative Demands. *See also* 28 U.S.C. § 1313(c) (1996).

73. Waller, *supra* note 2.

74. *See generally News Conference with: Attorney General Janet Reno, Senator Howard Metzenbaum, Representative Jack Brooks, Assistant Attorney General Anne Bingham, Introduction of the International Antitrust Enforcement Assistance Act of 1994*, FED. NEWS SERVICE, Jun. 13, 1994 [hereinafter News Conference with Janet Reno] (representing that the Act's purpose is to "facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis.").

75. *The International Antitrust Enforcement Assistance Act of 1994*, 4 U.S. MEXICO L. J. 169, 175.

to an antitrust mutual assistance agreement ("AMAA") with the U.S. [76] The agreements require reciprocity, meaning the respective U.S. agency would offer a certain type of assistance only if the respective foreign agency offered the same type of assistance. [77] The agreements also provide for the protection of confidential information. [78] Specifically, protection accorded to the documents, those offered by the U.S. to foreign agencies, must be no less than that provided under U.S. law. [79] Finally, the public interest must be satisfied. [80] The Attorney General can deny a request under an AMAA, in whole or in part. [81] If the request is granted, the DOJ or FTC can either disclose information in their files [82]and/or use their agency to investigate and obtain new evidence for foreign agencies. [83]

There are some exceptions to the information the DOJ or FTC can disclose. Disclosure of Hart-Scott-Rodino pre-merger information cannot be disclosed to a foreign authority. [84] Moreover, grand jury information must not be disclosed, pursuant to Federal Rule of Criminal Procedure 6(e), except upon a showing to a court of a "particularized need." [85] Further, the agencies may still be forced to disclose information if said disclosure is required by federal law. [85]

The ability to cooperate increased after the enactment of the IAEAA, but it was curiously followed less than half a year later by a restrictive revision of the DOJ and FTC's Guidelines. [87] The

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76. *See generally* 15 U.S.C. § 6201 (2000).

77. IAEAA § 3. That reciprocity can be provided "without regard to whether the conduct investigated violates any of the Federal antitrust laws." *See id.* § 3(c).

78. *Id.* § 8(b). Note that any evidence is exempt from the disclosure requirements of U.S. law, such as the Freedom of Information Act. *See supra* note 12 at 481.

79. IAEAA § 3.

80. *Id.* § 8 (a)(3) (requiring the "requested antitrust evidence" to be "consistent with the public interest of the United States.").

81. *Id.* § 3(a).

82. *See id.* § 2.

83. *Id.* § 3(b).

84. *See id.* § 5(1).

85. *See id.* § 5(2)(A).

86. *Id.* § 8(b).

87. *See* U.S. Department of Justice and Federal Trade Commission, Antitrust

IAEAA is mentioned in only one sentence in the Guidelines, during a description of attempts at cooperation with foreign nations. [88] The remainder of the sections reaffirm the effects doctrine and promote an aggressive extraterritorial approach to implementing that procedure. [89] This direct conflict between the Guidelines and the IAEAA seems illogical at first glance.

B. Progress In International Financial Law

Similar conflicts arise in the fields of international financial law, but in most areas, progress toward harmonization is already in place. For instance, in securities regulation, the International Organization of Securities Commissions (IOSCO) handles the transnationalization of the securities markets and makes proposals on forming a regulatory framework for those markets. [90] A second realm is banking law. Most international standards and negotiations among banking supervisors have been pursued by the Basle Committee. [91] Insider trading, a third example, has been handled at times by the IOSCO through recommendations, but by and large there has been little, if any, international move toward harmonization. [92] Finally, the IOSCO has produced recommendations on disclosure focusing on minimum standards of acceptable conduct in order to prevent the creation of unchecked regulatory competition that could produce a race to the bottom. [93] The U.S. recently agreed to a reciprocal disclosure agreement with Canada in forming the Multijurisdictional Disclosure System

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Enforcement Guidelines for International Operations, *supra* note 8 and accompanying text.

88. *Id.* at § 2.9-2.92.

89. *Id.* at § 3.1-4.22.

90. Sommer, *infra* note 95 and accompanying text.

91. *See* Jayasuriya, *supra* note 22 and accompanying text.

92. *See* Steinberg & Michaels, *supra* note 24 at 237; *see generally* Donald C. Lanevoort, *Cross-Border Insider Trading* (forthcoming 2001) (available on file with the Fordham Journal of Corporate & Financial Law) (arguing a minimum code of international insider trading law is the most viable intermediate step to solving the current web of conflicting laws governing the locus of the trade, the issuer, the broker, and other parties).

93. Steinberg & Michaels, *supra* note 24, at 237.

("MJDS").[94]

1. International Securities Regulation

The IOSCO began in 1974 after Western nations organized to discuss and issue recommendations on securities regulation and assist in asset capital formulation.[95] The group brings together governmental securities regulators, Self-Regulatory Organization representatives, and private sector members.[96] The by laws state that authorities resolve to cooperate to ensure better regulation of markets through the exchange of information, unified standards and surveillance of securities transactions, and mutual assistance of enforcement.[97] The IOSCO, however, cannot impose its recommendations on its members and consensus is often lacking on key issues.[98]

Like the WTO does for antitrust law, the IOSCO's ultimate objective is the harmonization of regulatory standards through recommendations operating through a system of network governance.[99] The members usually come from more ministerial governmental agencies and not from legislative ones.[100] Yet, these actors make the rules and recommendations for securities regulation which eventually are eventually embraced as international standards.[101]

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94. *See* Anna Drummond, *Securities Law: Internationalization of Securities Regulation – Multijurisdictional Disclosure System for Canada and the U.S.*, 36 VILL. L. REV. 775, 779 (1991).

95. *See* A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. Int'l L. & Bus. 15, 15-16 (1996).

96. *See* Roberta Karmel, *Securities Regulation: The IOSCO Venice Conference*, N.Y.L.J., Oct. 19, 1989, at 3.

97. International Organization of Securities Commissions, Preamble to the By-Laws (available on file with the Fordham Journal of Corporate & Financial Law).

98. *See* Karmel, *supra* note 96.

99. Jayasuriya, *supra* note 22, at 450.

100. *Id.*

101. *See* Geoffrey Underhill, *Keeping Governments Out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy*, 21 REV. INT'L STUD. 251, 273 (1995).

2. International Regulation Of Banking Law

The Basle Committee on Banking Supervision, another international regulatory body in financial law, chiefly attempts to strengthen the supervision of the international banking system by establishing mutual cooperation between supervisory agencies. [102] To achieve this, the Basle Committee requires these agencies pursuing broadly accepted guidelines, not detailed harmonization.[103] For instance, the Basle Accord on capital adequacy standards was agreed to by central banks to maintain adequate capital standards, which became of increasing import due to the integration of the financial services industry. [104] Before these standards were implemented, in the 1980s, there was a supervisory vacuum in this new global market. [105] Domestic agencies were still nationally oriented within their national banking systems.[106] Regulatory cooperation was driven by the desire to protect sovereignty while at the same time filling the vacuum. [107] However, the Basle Committee internationalized these banking agencies to a large extent, thus harming the internal sovereignty of the nations involved. [108]

3. Regulation Of International Insider Trading

Cross-border insider trading, on the other hand, is a topic where law has yet to harmonize and nations are reluctant to compromise their substantive or procedural law for a set of standards. Instead, the SEC often seeks MOUs for particular cases to facilitate investigation, not harmonization. [109] There is no current SEC policy on when U.S. insider trading rules will be

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102. Jayasuriya, *supra* note 22, at 449.

103. *See* David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 289 (1998).

104. Jayasuriya, *supra* note 22, at 448.

105. *See* WOLFGANG H. REINCKE, GLOBAL PUBLIC POLICY 104 (1998).

106. *Id.*

107. *Id.*

108. Jayasuriya, *supra* note 22, at 448.

109. *See generally* Langevoort, *supra* note 92.

applied extraterritorially. [110] For the SEC, the practice has been to take the trading site as the strongest factor in asserting jurisdiction.[111] The rationale the SEC uses for insider trading could include the desire to impose a strong fiduciary ethic, a cultural expression of economic regulation, and/or pure investor protectionism. [112] These factors are often dismissed by critics as simple advertising and public relations moves in favor of U.S. markets, with no real merit. [113]

4. International Disclosure Rules

International disclosure rules, on the other hand, are moving toward harmonization. The IOSCO develops many disclosure recommendations. More importantly, the MJDS between the U.S. and Canada formed to make disclosure, supervisory, and enforcement standards so similar that each nation can use the other's documents without harm to investors. [114] Essentially, the system, from the Canadian perspective, permits U.S. issuers who meet requirements to make offerings in Canada using disclosure documents which also satisfy SEC requirements. [115] The MJDS is similar to the IAEAA not only in that requires reciprocity, but also in that harmonization of disclosure standards is not a stated goal. [116]

II. THE IAEAA AND SIMILAR FINANCIAL LAW POLICIES: CONCESSIONS OR BREAKTHROUGHS?

The IAEAA was pitched to Congress as an initiative to protect consumers and businesses at risk from global

110. *Id.*
111. *Id.*
112. *Id.*
113. *See* Khanna et al., *Insider Trading, Outside Search and Resource Allocation: Why Firms and Society May Disagree on Insider Trading Restrictions*, 7 REV. FIN. STUD. 575 (1994).
114. *See* David S. Ruder, *Reconciling U.S. Disclosure Policy with International Accounting and Disclosure Standards*, 17 NW. J. INT'L L. & BUS. 1, 8 (1996).
115. Steinberg & Michaels, *supra* note 24, at 253.
116. *Id.* at 265.

anticompetitive behavior in the international economy. [117] At the same time, it was sold to the international community as a revolutionary "second generation" agreement, because it included the sharing of confidential information. [118] Yet, the international community did not know what to make of this breakthrough, given the strong case law and Guidelines favoring the extraterritorial approach. [119] The two approaches are inconsistent with one another at first glance. Not surprisingly, international financial law still faces similar conflicts on the path toward harmonization.

A. The DOJ/FTC: The IAEAA As One Of Many Valuable Tools

Initially, the IAEAA was said to be groundbreaking legislation. [120] Then Assistant Attorney General, Anne Bingham, claimed it might help eliminate unilateral actions, a policy angering other nations and thus hurting U.S. diplomatic efforts in various fields. [121] One commentator suggested that Canada might be the first country to sign an AMAA because its MLAT with the U.S. paralleled so many of the principles set out in the IAEAA. [122] After passage of the IAEAA, the FTC and DOJ sought a broad network of AMAAs to link prosecutions worldwide, particularly with the EU, because its member states were one of few groups with a solid body of domestic antitrust law and a record of tracking offenders internationally. [123] U.S. officials visited their counterparts

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117. *See* 140 Cong. Rec. H10453 (comments of Representative Hamilton Fish, one of the bill's co-sponsors in the House of Representatives).

118. Laudati & Friedbacher, *supra* note 14, at 478.

119. U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (Guidelines), *supra* note 8; *see also* Norton, *supra* note 8.

120. *News Conference with Attorney General Janet Reno, supra* note 74 and accompanying text.

121. *See Hearing on S2297 Before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 103d Cong., 2d Session (1994) (statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice).

122. *The International Antitrust Enforcement Assistance Act of 1994, supra* note 75, at 177.

123. *See* H.R. Rep. No. 103-772, 103d Cong. 2d Sess., at 14, 26 (Oct. 3, 1994) (Committee expresses opinion that despite some flux in the "sovereignty

in Germany, Ireland, the Netherlands, Spain, Sweden, and the United Kingdom to promote the IAEAA and a potential AMAA with an individual nation or with the EU as a whole. [124]

By early 1998, however, no AMAA was in place. The Chief of the Foreign Commerce Division of the Antitrust Department of the DOJ, Charles Stark, started characterizing the IAEAA in a less promising way. [125] Stark noted that the many nations still needed legislation allowing them to enter into an agreement like the IAEAA before they could even negotiate a AMAA, and that might be the reason none had yet been enacted. [126] More importantly, he characterized the IAEAA as one of many options for pursuing cooperation. [127] The talk of "second generation" agreements being the next step over antiquated "first-generation" MLATs and MOUs was conspicuously absent from his statements.[128] Stark concluded by urging the OECD to condemn cartels and fight them through cooperative means. [129]

On April 27, 1999 a year after Stark's speech, the U.S. and Australia signed the first (and only to date) AMAA. [130] The AMAA provides fewer tools than the original IAEAA hoped for. For instance, the party from whom information is requested can

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agreements" between the EU and member states, the EU has sovereign authority to administer and enforce its antitrust laws and to prohibit and regulate disclosure of information obtained in an antitrust investigation, as per IAEAA § 12 (9)); S. Rep. No. 103-388, 103d Cong., 2d Sess., at 15 (Sept. 30, 1994) (Committee argues that the EU is a "regional economic integration organization" within the definition of IAEAA § 12(9)).

124. Laudati & Friedbacher, *supra* note 14, at 479.

125. Stark, *supra* note 10.

126. *Id.* at 540 (stating "the legislative process is not something that can take place instantly. We are hopeful that many of our foreign partners will enact legislation, and there has been gratifying interest abroad in doing so.").

127. *Id.* These options included MLATs and MOUs, previously characterized by DOJ officials as outdated.

128. *Id.* (stating that "[t]he IAEAA is one avenue...for pursuing cooperation with foreign authorities...There are others...We have recently made a number of requests to foreign governments for assistance [in forming MLATs].").

129. *Id.* at 541.

130. Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999 (available on file with the Fordham Journal of Corporate & Financial Law).

deny assistance not only if the request is not in the public interest, but also if unauthorized by the domestic law of the requested party. [131] It is unclear if "domestic law" includes both procedural and substantive law. Further, the Agreement makes a broad statement on disclosure, asserting that no private person will have any rights to shared information. [132] Further into the Agreement, however, there is a provision allowing for disclosure of confidential information if it is permitted by the requesting party's own law. [133] Thus, it seems a strict rule of confidentiality could not be achieved, and the party requesting material may have to yield to the substantive law of the party granting any information.

While the Agreement was being signed, the FTC continued its attacks on the WTO and its characterization of the IAEAA as a tool in their cabinet. [134] Commissioner Mozelle Thompson asserted that there could be no genuine convergence on antitrust law. [135] The WTO's plan to pursue an international code or guidelines, Thompson argued, is far off and unrealistic. [136] Conflict, cooperation, and convergence are the three options in international law enforcement, according to Thompson, and any combination of the three can occur simultaneously. [137]

Despire Thompson's theory, the OECD's traditional promotion of cooperation through MLATs and the use of the IAEAA are valuable, but conflict is necessary to enforce U.S.

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131. *Id.* at Art. IV(A)(3,4).

132. *Id.* at Art. II(H) (announcing that "[t]he provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence.").

133. *Id.* at Art. VI(B)(5) (stating "[n]othing in this Agreement shall prevent disclosure, in an action or proceeding brought by an Antitrust Authority of the Requesting Party for a violation of the antitrust laws of the Requesting Party, of antitrust evidence provided hereunder to a defendant or respondent in that action or proceeding, if such disclosure is required by the law of the Requesting Party."). It should be noted that, presumably, pre-merger information and grand jury information, which the Agreement does not specifically speak to, cannot be disclosed.

134. *See Thompson on International Antitrust Policy and Convergence Issues*, FTC: Watch No. 518, Mar. 15, 1999.

135. *Id.*

136. *Id.*

137. *Id.*

standards. [138] This idea is consistent with the Guidelines, which state that once power over the subject matter and the parties is established through the effects doctrine, only then will comity be considered. [139] Comity, from the U.S. perspective, includes most importantly whether an MLAT or AMAA could be reached with another nation. [140] When extraterritorial action is not possible, cooperation should be turned to, not vice versa. [141]

By early 2000, the new Assistant Attorney General, Joel Klein, had placed the IAEAA on the same level as the MLATs. [142] He cited the unique cases of the MCI/WorldCom and Dresser/Halliburton mergers, where the parties waived confidentiality, allowing the U.S. and the European Commission to share information on the matter freely. [143] In fact, Klein emphasized the importance of MLATs over the IAEAA when stressing the use of positive comity provisions in MLATs with the EU, Canada, Japan, Israel, and Brazil in recent years, because they allow a nation to take action under domestic laws. [144] Instead of forcing cooperation through set confidentiality standards or substantive law codes, the DOJ promotes comity and trust in the

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138. *Id.* However, Thompson did note convergence in market definition guidelines between the EU's "1997 Market Definition Guidelines" and the "1992 Horizontal Merger Guidelines" followed by the DOJ and FTC.

139. *See Antitrust Guidelines for International Operations – Coudert Brothers*, MONDAQ BUS. BRIEFING, Dec. 2, 1998 (discussing the real-world limitations on extraterritorial application of U.S. enforcement law and how once jurisdiction is establish, U.S. substantive law applies, whether the case is domestic or international).

140. Guidelines § 3.2 (stating the U.S. will take into account "the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected, and...the effectiveness of foreign enforcement as compared to U.S. enforcement action.").

141. Prepared Statement of Joel I. Klein, *supra* note 4 and accompanying text.

142. *See id.* (stating that "to help us make effective use of that authority to protect U.S. markets against conduct taking place abroad, we have negotiated numerous mutual assistance agreements with our foreign counterparts. One agreement, negotiated with Australia under the IAEAA...allows us to share certain confidential information under appropriate protections.").

143. *Id.*

144. *Id.* "In all such agreements, the U.S., of course, retains it sovereign right to undertake antitrust actions under its own laws."

ability of other nations to handle matters under domestic laws. The IAEAA, Klein seemed to assert, is one of many tools in assuring comity. [145]

B. IAEAA As Concession To International Pressure For Change

In a news conference in which Attorney General Janet Reno announced the introduction of the IAEAA into Congress, then Assistant Attorney General Bingham revealed some interesting opinions. [146] Initially in the conference, she painted the bill as doing what subpoenas could not by going across borders. [147] When asked if the bill would force the DOJ to issue subpoenas on behalf of foreign nations against Americans on U.S. soil, Bingham balked and emphasized that the best part of the bill was that it allowed the U.S. to opt-out of cooperation. [148] As she noted, requests under the IAEAA are made on a case-by-case basis and can be denied at the DOJ or FTC's discretion. [149] This attitude of "we will get what we can and move on" forces an examination of international criticism of the IAEAA as a concession to international demands, and a look at the effect of the provisions and theory behind the IAEAA.

1. International Criticism And Skepticism

The day the IAEAA passed, Japanese officials rebuffed any idea that they would join into an AMAA with the U.S. [150] Their primary concern was that the policy buttressing the IAEAA was to enforce U.S. antitrust law against foreign companies competing

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145. *See* Irwin Stelzer, *Trust Busters Link Up to Fight Price Fixers*, SUNDAY TIMES (London), Sept. 24, 2000 (quoting Klein's comment that America accepted the EU's lead role in handling the MCI/TeleCom merger because "we had confidence in the performance and policies of the UK's market-oriented telecom regulator.").

146. *See New Conference with Janet Reno, supra* note 74.

147. *Id.* "This bill will enable us to have access to documents we can't reach today because U.S. subpoenas cannot cross national borders. . .we need it badly to do the international antitrust for documents. . ."

148. *Id.* "We want this bill because we need documents abroad to do our enforcement. This is not a gift to foreign countries."

149. IAEAA § 8(a)(3) (covering the "public interest" provision).

150. Rice, *supra* note 5.

with U.S. exporters, whether or not the activity had a great effect on the U.S. domestic market. [151] The idea particularly troubled the Japanese because of concurrent trade negotiations occurring in relevant industries. [152] In the same year, the Clinton administration demanded that Japan strengthen its antitrust enforcement while suggesting trade sanctions. [153] The introduction of the Guidelines only a year later caused Japan even more consternation, given Japan's desire to maintain a dominant position in the Asian market from which U.S. competitors had been excluded and the relative strictness of U.S. substantive law. [154]

The EU also questioned the IAEAA. [155] Under article 20 of Regulation 17 of the EC Treaty, the European Commission can only use antitrust information acquired in its capacity as a competition authority for the investigation it was acquired for. [156] If the inquiry is into a cartel defined in Article 85 and 86, however, it could be argued the EC could use its necessary powers under Regulation 17 to aid the U.S. under an AMAA. [157] Unfortunately, the European Court has ruled that the EC has an overriding duty to ensure that confidential information remains as such in the commercial context. [158] Because foreign authorities are not even mentioned in Regulation 17, could be inconsistent to provide the U.S. with confidential information. [159] As a result, the EC balked at any idea of revising Regulation 17 to allow an AMAA. [160]

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151. *Id.*

152. *Id.* "The U.S. Department of Justice and Trade Representative began investigating alleged anticompetitive practices in eight sectors of Japanese industry in September. The sectors are believed to be car parts...sheet glass...The opening of Japan's glass and motor markets are also the subject of urgent and none too-friendly trade negotiations."

153. *See* Robert E. Montgomery, Jr., *Tough Antitrust Stance by U.S. Bad News for Japan*, THE NIKKEI WEEKLY, Dec. 19, 1994.

154. *Id.*

155. *See generally U.S. Antitrust Bill and the EC*, BUS. L. EUR., Sept. 14, 1994.

156. *Id.*

157. *Id.* Articles 85 and 86 provide for supplying information gathered on cartels to investigations other than the matter for which the evidence was originally organized for.

158. *Id.*

159. *Id.*

160. *Id.* "The Commission has shown a marked reluctance to contemplate

European nations are particularly concerned about how the IAEAA gels with the Guidelines. Some argue the Guidelines would deny courts a role in factoring in comity to jurisdictional issues, instead leaving such discretion entirely to the FTC and DOJ. [161] Some U.S. commentators are worried the Guidelines' aggressive stance will be viewed as a threat, especially since jurisdictional matters are to be handled by bureaucratic agencies and not courts in which challenges can be made. [162] One hypothetical in the Guidelines, for instance, allows the U.S. jurisdiction if more than half the financial risk of the transaction is born by the U.S. [163] Such a bold stance hurts the chances of there being any talk of cooperation fostered by the IAEAA. [164] Further, the Guidelines go against *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, where the Supreme Court held that a predatory pricing conspiracy could not be inferred from cartels raising prices in foreign markets. [165] By contrast, the Guidelines, in another hypothetical, state that the U.S. has jurisdiction over a price fixing agreement that impairs output and price in the U.S. [166]

The former commissioner of the FTC sharply criticized this dichotomy. [167] He questioned why someone would want to hail extraterritorial action through the Guidelines because such actions

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revision since it might open up the 32-year-old measure to unwelcome interference by the Council."

161. *See* Peter Blackman, *International Antitrust: Agencies Take Bold Stand on Foreign Operations*, N.Y.L.J., Nov. 3, 1994.

162. *Id.* "There is a sense among those familiar with the document that it reflects a general shift in favor of the enforcers and away from the courts in [the] crafting of antitrust law, according to Richard M. Steur, partner at Kaye, Scholer, Fierman, Hays & Handler." *Id.*

163. Guidelines, Illustrative Example B

164. Blackmun, *supra* note 161 (quoting Joseph Griffin, partner in Morgan, Lewis & Bockius as arguing "[The DOJ and FTC are] trying to say if we confront a set of extraterritorial conduct, we will talk to the other foreign government about it, but we reserve the right to go right ahead and prosecute to the fullest extent of U.S. law . . . . There is always a threat in the background of any consultation.").

165. 491 U.S. 1029, 1039 (1986).

166. *See* Guidelines, Illustrative Example C.

167. Calvani, *supra* note 39.

violate the rights of other nations. [168] The Guidelines directly undermine the goals set forth by the IAEAA and promote a confusing policy, according to the former commissioner. [169]

The British antitrust enforcement groups recognize this disparity. [170] Many provisions in the Guidelines, especially the claim that foreclosure of a foreign market has an effect on the U.S. market and thus is subject to U.S. jurisdiction, are objectionable to the British as an instrument of trade policy used to open up foreign markets to U.S. producers. [171] More troubling to the British is that the Guidelines consider the effectiveness of a nation's enforcement of their domestic antitrust laws against a violator as part of the FTC and DOJ's analysis of comity. [172] The British government perceives this as failing to respect the discretion of foreign enforcement authorities and an inappropriate use of antitrust power. [173] The U.S. counters that the effects doctrine is now gaining use internationally; for instance, European competition laws require that anticompetitive conduct affects trade between member states in order to be considered a violation. [174] The British claims that this interpretation ignores the European Court of Justice's ruling that a valid claim under European law only occurs when the conduct was implemented within the community. [175] As a result, the contrast between the Guidelines and the IAEAA has caused uncertainty in the international community, and thus may slow commerce and growth. [176]

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168. *Id.* "Such laws, it might be expected, would be employed sparingly and only where there was a strong national interest stake that warranted the compromise of another nation's sovereignty."

169. *Id.*

170. *See UK responds to U.S. Guidelines*, BUS. L. EUR., Feb. 15, 1995.

171. *Id.*

172. *Id.*

173. *Id.*

174. *See* Prepared Statement of Joel I. Klein, *supra* note 4.

175. *Id.*

176. *Id.* "The issue has also sparked fears in the international business community about the uncertainty and risk of conflicting legal requirements that it creates, dampening international commerce and investment."

2. The Increase In The Use Of MLATS While The IAEAA Is Ignored

Three years after the IAEAA passed, not a single AMAA had been implemented. The Assistant Attorney General Klein turned his attention to MLATs to aid in information sharing. [177] Specifically, he encouraged cartel-only agreements where substantive antitrust provisions were similar between nations. [178] At the same time, Klein noted that even Canada did not yet want to enter into an AMAA, and that the process for signing these agreements under the IAEAA was going too slowly. [179] In particular, he noted that many nations worried that AMAAs would require them to provide market access information, a trade issue they argue should have nothing to do with antitrust law. [180] Other DOJ officials have noted, however, that if a foreign government or the U.S. characterized another nation's request under an AMAA as a trade-based request, it can simply deny the request. [181] Other nations are still concerned with the confidentiality provisions in the IAEAA, but Klein noted that if their fears cannot be relieved, MLATs will be entered into. [182]

The concerns that other nations have are best revealed by examining the AMAA the U.S. negotiated with Australia. Confidential evidence shared under that AMAA can be disclosed once private litigation commences, but until that time, the U.S. and Australia are under a duty to oppose third-party applications to the

177. *See Klein Seeks Cartel-Only International Agreements*, FTC: Watch, Oct. 27, 1997.

178. *Id.*

179. *See Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Oct. 16, 1997 speech by Assistant Attorney General Kelin at the Fordham Corp. L. Inst., FAXline No. 2621.

180. *Id.*

181. *See U.S. Official Chats Up Corporate Lawyers on New International Antitrust Aid Law*, FTC: Watch, Mar. 27, 1995.

182. Prepared Statement of Joel I. Klein, *supra* note 4 (quoting Klein as stating "[i]f some of our trading partners have difficulties with full-blown IAEAA agreements, and given the increasingly serious threat that international cartels pose to the world economy, we are fully prepared to enter into mutual assistance agreements that cover only hard-core cartel behavior.").

fullest extent possible by their respective disclosure laws. [183] Europeans might scorn this provision because companies supply most information voluntarily in EC antitrust proceedings. [184] Anything that diminished this exchange would greatly hamper the EC's ability to enforce its laws. [185] Further, the Europeans prefer MLATs because they usually define whether or not the information that is shared will be used for criminal prosecutions or civil antitrust cases, a distinction which most European nations laws do not provide for. [186]

These concerns have led to a proliferation of MLATs while the IAEAA has been ignored. In 1999, the U.S. signed MLATs with both Japan and Brazil, with the goal of opening up those markets to U.S. competition. [187] The EU and the U.S. entered into a similar agreement in May of 2000 when they created a merger task force to establish areas where soft merger harmonization can be considered while antitrust laws are upheld. [188] Canada is considering amending its Competition Act to allow it to enter into an AMAA, but it is far from the proposal stage due to wrangling internally over information-sharing safeguards. [189]

3. Problems With Specific IAEAA Provisions

The confidentiality problem troubling other nations should be lessened by a broad provision in the IAEAA prohibiting the DOJ or FTC from disclosing any information obtained through an AMAA. [190] On the other hand, Federal Rule of Civil Procedure 26(b) allows defendants access to any material relevant to the litigation. [191] Nations might be wary of that information leaking into the hands of U.S. defendants who are competitors to their

183. *See U.S. and Australia Agree on Evidence*, BUS. L. EUR., Apr. 30, 1997.
184. *Id.*
185. *Id.*
186. *Id.*
187. *See Japan, Brazil to Sign U.S. Antitrust Pacts*, FTC: Watch, July 26, 1999.
188. *See U.S.-EU Task Force on Harmonization*, FTC: Watch, May 22, 2000.
189. *See Don't Rush Canada, ABA Warns*, FTC: Watch, Sept. 25, 2000.
190. IAEAA § 8(b).
191. *See* Fed. R. Civ. Pro. 26(b) (stating that discovery is allowed so long as it is "reasonably calculated to lead to the discovery of admissible evidence.").

respective nation's companies. [192]

At the same time, the IAEAA might not provide enough confidential information to other nations to be viewed as worthwhile, particularly in the case the transfer of grand jury information. [193] Federal Rule of Criminal Procedure 6(e) permits state attorney generals to obtain grand jury information only if it may aid in disclosing a crime. [194] The rule was amended to this lower level of proof from the "particularized need" standard set forth in case law. [195] That standard was abandoned. If a U.S. attorney thought evidence could prove a criminal violation, the particularized need was thus proven.[196] Congress found no reason why a state should have to prove the particularized need a second time. [197] Foreign agencies argue they shouldn't have to meet this outdated standard. [198] Because grand jury information is often an important source of evidence in criminal investigations, [199] other nations believe including it in the IAEAA would make AMAAs more likely. [200] Handing over grand jury information is made difficult by the IAEAA requirement that, at the very least, a level of protection established by U.S. law for confidential grand jury information. [201] This is a protection other nations might not be able to provide. [202]

Another problem arises over the provision of the IAEAA

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192. Laudati & Friedbacher, *supra* note 14, at 481-82.

193. *See* Laurie Freeman, *U.S. Canadian Information Sharing and the International Antitrust Enforcement Assistance Act of 1994*, 84 GEO. L.J. 339, 346 (1995).

194. Fed. R. Crim. Pro. 6(e).

195. *See* Illinois v. Abbott & Assoc., Inc., 460 U.S. 557, 558 (1983) (finding that state attorney generals do not have access to grand jury materials under FRCP 6(e)).

196. *Id.*

197. H.R. Rep. No. 772, 103d Cong., 2d Sess. 7 (1994).

198. *Japan May Resist U.S. Overtures, supra* note, 28 at 366.

199. *See* Nina A. Pala, Comment, *Grant Jury Disclosure in Antitrust Litigation*, 32 CATH. U. L. REV., 437, 463 (1983).

200. *See* Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under the Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623, 1630 (1984).

201. IAEAA § 12(2).

202. *Id.*

allowing information sharing only when foreign antitrust laws are substantially similar to U.S. antitrust laws by prohibiting similar conduct. [203] Assistant Attorney General Bingham, during congressional hearings considering the IAEAA, related the worthiness of the provision in allowing the U.S. to reject requests based on foreign laws labeled "antitrust," but actually having no substantive law judgments. [204] In many nations, such as Japan, there is no mandate for extraterritorial action in prosecuting foreigners—it can only occur indirectly through the involvement of a Japanese or other domestic party. [205]

The IAEAA is also questioned for what it excludes the treatment of some Fifth Amendment privileged information. [206] The Supreme Court, in *United States v. Balsy's*, [207] held that the Fifth Amendment usually will not permit someone to refuse to testify merely because he or she fears prosecution in a foreign country. [208] That fear, however, could be justified if agreements or convergence of international law occurred, and the possible future prosecution would no longer be considered distinctly foreign. [209] The Third Circuit, in *In Re: Impounded*, found no such connection, despite the existence of the IAEAA, in part because the defendants feared no prosecution in Australia. [210]

Finally, the provision requiring that any request by a foreign authority must be deemed in the public interest of the U.S. has

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203. *Id.* § 12(7).

204. *See* House Subcommittee on Economic and Commercial Law, Questions for Assistant Attorney General for Antitrust Anne K. Bingaman Concerning H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994 (Sept. 12, 1994), answer to questions 11, 12.

205. YOSHIO OHARA, INTERNATIONAL CONTRACTS AND AGREEMENTS, 5 DOING BUS. IN JAPAN, SECURITY TRANSACTIONS, ANTIMONOPOLY REGULATIONS, TAXATION 7.01[1][A] (Zentaro Kitagawa ed. 1997).

206. *See* Honorable Diane P. Wood, *Symposium: Competing Competition Laws: Do We Need A Global Standard?*, 34 NEW ENG. L. REV. 103, 111 (1999).

207. 524 U.S. 666 (1998).

208. *Id.* at 671.

209. *Id.* at 683. "This is not to say that cooperative effort between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood."

210. *See In Re* Impounded, 178 F.3d 150, 173-74 (3d Cir. 1999).

many consequences. [211] Indeed, under the principle of reciprocity set out in section 12(2), both nations in an AMAA may deny a request if it is inconsistent with their public interest. [212] Thus, even if antitrust authorities work under similar procedural and substantive laws, one agency could deny a request because it disagrees with the degree of enforcement of its counterpart. [213] The reasons a nation, especially the U.S., would make such denials relates to possible deficiencies in the formulation of the IAEAA.

4. Problems With The Theory Underlying The IAEAA

Many commentators, discussing the merits of the IAEAA when it was only legislation, suggested the evidence provided to the EC under the IAEAA would automatically be disclosed to all member states, including those who might have proprietary interests in a company being investigated or a company competing with the U.S. company being investigated. [214] The public interest provision has been cited as a way of preventing such an action. [215] Other commentators have argued that the disclosure provision will be of no worth since its inclusion does not guarantee any real reciprocity, and thus the IAEAA does not either. [216] In addition, few nations outside the EU have the commitment to prosecuting

211. IAEAA § 8(a)(3). "Neither the Attorney General nor the Commission may conduct an investigation... or provide antitrust evidence to a foreign antitrust authority... unless... conducting such investigation, applying for such order, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States." *Id.*

212. *Id.* at §§ 8(a), 12(2).

213. Geralyn Trujillo, *Mutual Assistance Under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement*, 33 TEX. INT'L L.J. 613, 619 (1998).

214. *See* Report of the Section of the Antitrust Law and he Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act, Aug. 1, 1994, at 20 and n.24; *see also* case C-36/92P Samenwerkende Elektriciteits-producktiebedtrijven NV (SEP) v. Europena Commission (1994) ECR I-1911, sections 35-37 (holding the EC has been vested with the power to protect business secrets).

215. Laudati & Friedbacher, *supra* note 14, at 492-93.

216. IAEAA § 8(a)(3).

violators of their antitrust laws who are also firms inside their nation. [217] Further, most nations already have MLATs or equivalent agreements to share information without a reciprocity agreement attached. [218]

The theory behind the IAEAA, given its practical and philosophical flaws, has been examined earlier in this note. [219] The U.S., through the OECD, argues for cooperation in combating cartels and for individual members of the OECD to adopt similar regulations to that effect. [220] The U.S. also urges these nations to remove obstacles to sharing information, thus allowing for MLATs. [221] Yet, the U.S. will continue to assert its right to extraterritorial action through the Guidelines before any cooperation as long as cartels and monopolies, such as the ones in Japan, are perceived as a means to defeat the U.S. economically. [222] According to some commentators, the U.S. will continue to argue for cooperative agreements, as they do at the OECD, because it does not want any part of harmonization of antitrust law. [223]

The EU, through the EC, and Japan, continue to push for an international body of law on various antitrust subjects in order to move beyond cooperation. [224] Key EC officials have advocated this

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217. *See e.g.*, Case 89/85, Ahlstrom Oaskeyhito v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988) (discussing a case against a cartel of wood pulp producers located outside any EU member-state, but which included U.S. companies).

218. *See In re* Malev Hungarian Airlines, 964 F.2d 97, 101 (2d Cir. 1992) ("Congress intended... that 28 U.S.C. § 1782 would provide an avenue for jurisdictional assistance to foreign to international tribunals whether or not reciprocal arrangements existed."), *cert. denied* sub nom.; United Tech. Int'l v. Malev Hungarian Airlines, 506 U.S. 861 (1992).

219. Waller *supra* note 2 and accompanying text.

220. *See* Neal R. Stoll and Shepard Goldfein, *International Cooperation in Enforcement*, N.Y.L.J., June 16, 1998.

221. *Id.*

222. *See* Frank Fenton, *El Mayor Desafio Comercial De Eu; U.S. Biggest Trade Challenge*, ACERO-NORTH AM. STEEL J., Nov. 1, 1995.

223. *See, e.g.*, Dominic Benicivenga, *Bilateral Pacts Seen as Crucial to Enforcement*, N.Y.L.J., Dec. 12, 1996 (quoting A. Paul Victor, partner at Weil, Gotshal & Manges, arguing that the U.S. wants to avoid being "[h]ung up on substantive convergence and what is a violation" by pressing for cooperative agreements).

224. Waller, *The Internationalization of Antitrust Enforcement, supra* note 1,

approach throughout the past decade. [225] To meet these goals, in June 1996, the EC proposed that the WTO begin developing international antitrust rules. [226] Some U.S. commentators agree the time is ripe for such a convergence, at least on the base issues all industrialized nations can agree on, and especially because existing bilateral agreements are too narrow in scope for application in global markets. [227]

The U.S. refuses to accept convergence because any minimum international standards might easily become maximum standards.[228] Approximately half the WTO membership does not have any serious competition law or enforcement body, the U.S. asserts, leading to a fear of the "lowest common denominator"—a weak set of rules that would compromise our strong body of antitrust law. [229] One commentator posits that the U.S. is using cooperation as it does extraterritorial action, to block the development of any international code. [230] The Boeing-McDonnell Douglas Corp. merger demonstrated that the EC had become a major player in the trade regulation field whom companies would have to answer to under one body of law while answering to the U.S. under a very

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at 383.

225. *See* Alex Jacquemin, *Towards an Internationalization of Competition Policy*, 18 WORLD ECON. 781 (1995); Karl Van Miert, *EU Competition Policy in the New Trade Order,* Address to the Olso Conference, Competition Policies for an Integrated World Economy, Oslo, Norway (June 14, 1996).

226. *See* Commission Press Release, IP(96) 523 (June 18, 1996); *European Commission Will Urge WTO to Spearhead World Antitrust Battle*, 70 ANTITRUST & TRADE REG. REP. (BNA) 693 (1996).

227. *U.S. and Australia Agree on Evidence, supra* note 183 (quoting Eleanor M. Fox, professor of trade regulation at NYU as stating WTO nations agree on a principle that there will be "no unreasonable public or private restraints on market access.").

228. *Id.* (quoting Assistant Attorney General Klein as stating "[t]oo frequently, minimum standards become maximum standards... The U.S. has a 100-year history with antitrust law and somehow we wouldn't want to see any set of minimum standards trump our standards or otherwise undermine them.").

229. Griffin, *supra* note 15, at 322-23.

230. Bencivenga, *supra* note 54 (quoting Spencer Weber Waller, associate dean of Brooklyn Law School: "[t]he U.S. has tried to use extraterritoriality as an alternative to having a true international antitrust law... Now, the U.S. is promoting cooperation in enforcement to again block the development of an international antitrust code.").

different body of law. [231] The result may be companies answering to many different antitrust regimes when all the nations involved in an anticompetitive monopoly assert jurisdiction. [232] Ironically, Klein is concerned that any WTO convergence agreement, such as an international antitrust court, would interfere with our national sovereignty through the inappropriate review of witnesses, poor use of prosecutorial discretion, and the release of confidential business information. [233] He is thus arguing that other nations should not be allowed to engage in extraterritorial action. [234]

C. Conflicts And Compromise In Financial Law

Unlike antitrust law, a distinct field, financial law is comprised of multiple fields. However, with technological and legislative innovation prompting companies to seek out non-traditional risks, the demarcation between the banking and securities industries is becoming so blurred that fundamental differences soon may no longer exist. [235] In response, groups like the IOSCO and the Basle Committee have acted to set standards for members to follow in securities regulation and banking law. [236] They are standards, not rules, so as to accommodate national sovereignty during the process of harmonization. [237] Rules frighten away international actors due to their rigidity, as opposed to standards which must be met or not gone beyond. [238]

For instance, the Basle Committee left enforcement of the Basle Accord's capital adequacy standards up to member nations

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231. *Id.* (noting the EC's threat to block the merger after the U.S. approved, resulting in a drastic change in the deal).

232. *Id.* (quoting Klein as stating "[t]here will be times when different countries will have different antitrust regimes and I think to the extent more than one country has jurisdiction, you are going to have to satisfy each of these countries.").

233. Griffin, *supra* note 15, at 323.

234. *Id.*

235. *See* Joseph L. Norton, *The Glass-Steagall Act and Related Bank Legislative Reform in the United States*, 14 B.F.L.R. 1-42 (1998).

236. Jayasuriya, *supra* note 22, at 451.

237. *Id.*

238. *Id.*

and their agencies. [239] Thus, enforcement of standards are left to these agencies and not to a supernational authority or any single nation. [240] The IOSCO operates in the same way when regulating securities, laying down standards and monitoring compliance without enforcement. [241] Some authors posit that this system of decentralized enforcement is the new regulatory model in various areas, not only financial law, but also environmental and intellectual property law. [242] The international body passing these regulations need only monitor member compliance rather than directly enforce standards. [243] One author calls this trend, developing in most major fields aside from antitrust law, a system of network governance providing broad standards and relying largely on national agencies for compliance. [244]

On the other hand, regulation of insider trading has produced similar results to antitrust proposals. The choice of when to apply insider trading law and to what extent is largely left to the nation making the claim of a violation of its particular laws. [245] The debate has thus involved how to make that choice, with the SEC emphasizing the site of the fraud and at least one author recommending the location of the domestic issuer. [246] The same author argues there may be another approach: to allow a nation to rent out its regulations, permitting a foreign nation to commit to the first nation's laws to reap the benefit of more stringent insider trading regulation. [247] Yet, even this author recognizes that each solution is only a intermediate one, especially since nations will be reluctant to use their scarce resources to aggressively regulate insider trading when going after multinational corporations

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239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *See generally* Abram Chayes & Anotonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993).
244. Jayasuriya, *supra* note 22, at 453.
245. *See* Stephen Choi & Andrew Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 SO. CAL. L. REV. 903 (1998).
246. *See* Langevoort, *supra* note 92.
247. *Id.*

without strong domestic connections to that nation. [248] The viable alternative, according to some, would be an international organization like the IOSCO with full criminal and civil power. [249] Without such a group as the ultimate goal, as in antitrust law, instances of cross-border insider trading will increase without a corresponding increase in global enforcement to meet the tide head-on. [250]

Despite the MJDS and similar EC agreements (but only within that body), moves toward global disclosure harmonization have been slow. [251] One author recommends the IOSCO continue proposing a international disclosure document for use in both domestic and international offerings. [252] The SEC has been criticized for what some call an arbitrary and stringent determination to stick with U.S. disclosure mandates. [253] Given that the SEC has the leverage to negotiate standards to its liking on the international scale, and given the increasing multinational nature of transactions, it might in the SEC's best interests to relax those demands. [254] In fact, in an International Equity Offers report by the IOSCO, the group recommended harmonization not only through a single international disclosure document, but also through reciprocity or cooperation between two or more nations. [255]

Financial opportunities emerging from recent technological innovations create the potential for financial institutions to accumulate significant losses over short periods of time. [256] The linkages across financial markets and volatility of capital flows creates the potential for disturbances such as the East Asian

248. *Id.* The author notes the obstacles to a strict international policing of insider trading that the U.S. and its companies would like.

249. *Id.*; *see also* Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANS. L. 9 (1999).

250. *Id.*

251. Steinberg & Michaels, *supra* note 24 and accompanying text.

252. *Id.*

253. *See generally* Bevis Longstrth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANS. L. 319 (1995).

254. *Id.*

255. *See* International Equity Offers, Report on the Technical Committee of IOSCO 7 (Sept. 1989) (manuscript on file with the IOSCO).

256. Norton, *supra* note 18 at 141.

Financial Crises of 1997-1998, which gravely effect other institutional groups and markets. [257] This contagin effect can only be met by a corresponding international body or set of standards.[258] Indeed, regulators are currently playing catch-up to market developments spurred on by financial innovations, affecting both financial and antitrust law. [259]

III. THE IAEAA CAN ONLY SUCCEED IF HARMONIZATION BEGINS AS IT HAS IN THE INTERNATIONAL FINANCIAL REALM

The extraterritorial approach to antitrust and financial law is hypocritical in practice. The U.S. can force other nations to sit idly by while it plucks foreign citizens and evidence from their boundaries. [260] If another nation dares to exert the same type of procedural authority, the U.S. will scream national sovereignty. [261] Supporting this reaction is, in part, the rationale that because U.S. substantive law antitrust law arrived on the scene first, it must have prominence internationally. [262] But a more important reason may be that Congress and the U.S. business community are determined to protect our international trade policy regardless of what would prove to be a just international antitrust policy. [263] The courts have wavered in their support of the extraterritorial approach, resulting in opinions favoring comity and discounting *Alcoa*'s effects test, [264] such as *Timberlane* [265] and *Zenith Radio*, [266] while supporting the FTC and DOJ in *Hartford Fire* [267] in a 5-4 Supreme Court decision.

Foreign nations, particularly our main trade competitors in the EU and Japan, have recognized the U.S.'s stance and have

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257. *Id.*
258. *Id.* at 146.
259. *See e.g.,* Cross-Border Electronic Banking (J.J. Norton & C. Reed eds., 1994).
260. Griffin, *supra* note 15 and accompanying text.
261. *New Conference with Janet Reno, supra* note 74.
262. Griffin, *supra* note 15 and accompanying text.
263. Waller, *supra* note 2.
264. 148 F.2d 416, 443-44 (2d Cir. 1945).
265. 549 F.2d 597, 611-12 (9th Cir. 1976).
266. 491 U.S. 1029, 1039 (1986).
267. 509 U.S. 764 (1993).

attempted to produce gains on the other side of the spectrum, harmonization/convergence. [268] Any sweeping set of international standards surely would be to the benefit of these nations by actually becoming minimum standards for the U.S. [269] Even European and Japanese antitrust law is not well developed, and any broad international code would tie the hands of U.S. regulators while freeing up numerous practices that would be illegal to U.S. firms practicing on U.S. soil. [270] These nations have equally strong interests in protecting their trade policies, especially against the current U.S. market dominance. Any notion that they are urging harmonization solely for the sake of justice would be naïve.

But harmonization may be necessary to meet the unnerving speed of technological innovation and the opportunities for securities fraud and antitrust violation that brings. [271] Cartels are expanding across borders in the same way financial markets are overlapping. Consistency is the key. In order for investors and companies to have confidence in any market, there must be consistent regulation of similar financial services and activities of banks and firms, just as there must be consistent antitrust procedures and substantive law. Cooperative information-sharing agreements are a first step, but without the goal of consistency through harmonization in mind, such agreements ignore the long-range needs of the global economy. The Basle Committee recognized those needs by consolidating supervision and the lucid division of responsibilities between any supervisors for cross-border banking. [272] Such an urgency has not yet been felt by the U.S. in antitrust law.

At first blush, the current form of cooperation provides a valuable solution for antitrust disputes. MLATs and MOUs continue to be successful weapons in international prosecutions. Indeed, the DOJ continued to aggressively seek out MLATs while acknowledging the IAEAA ineffectiveness to date. [273] But their

268. Bencivenga, *supra* note 54.

269. *See U.S. and Australia Agree on Evidence, supra* note 183 and accompanying text.

270. Waller, *supra* note 2 and accompanying text.

271. Norton, supra note 18, at 143.

272. *Id.* at 145.

273. Prepared Statement of Joel I. Klein, *supra* note 4.

effectiveness is limited by the U.S.'s strict Guidelines that preempt any considerations of comity. [274] Differences in confidentiality and disclosure rules result in limited international use of such arrangements. [275]

Using the IAEAA would be the next logical step. Unfortunately, it was implemented without a necessary minimal harmonization of international antitrust law in place. Key to such a harmonization beginning, remembering that complete convergence sometimes proposed by the WTO is wasteful and unrealistic, is agreement on procedural standards. If the U.S. would revised the effects doctrine to respect comity before extraterritoriality, whether in case law or through revisions of the Guidelines, Japan and many European nations would now have procedural antitrust laws that mesh with the U.S. Only then can two nations discussing an AMAA even examine whether their substantive laws are substantially similar. Currently, nations ignore the use of the IAEAA because they know that even if their substantive laws fulfill this requirement, the U.S. can join in an AMAA and share information while reserving the right to use extraterritorial action whenever it chooses. [276] Why would a nation whose companies are in direct trade competition agree to these ground rules?

In direct contrast is the development of international securities regulation. The IOSCO emerged as the forum for international cooperation and information sharing amongst regulators.[277] IOSCO recommendations on regulatory standards, cooperation, and reciprocity have resulted in MOUs which have harmonization as their goal. [278] Development of standards is necessary in the face of the contagin effect, whereby the collapse of one market can have drastic effects on all the rest. [279] In the same way, underdeveloped nations may and often join together to form cartels to gain access and control of emerging markets. Their

274. Calvani, *supra* note 39 and accompanying text.
275. Waller, *supra* note 2 and accompanying text.
276. Stoll & Goldfein, *supra* note 220 and accompanying text.
277. Norton, *supra* note 18, at 145.
278. *Id.*.
279. *Id.* at 146.

influence can have a contagin effect on other markets as access disappears and efficiency falters. Unfortunately, no tool is in place to promote such an effective antitrust policy.

Which brings the debate back to another procedural area that must be resolved before the IAEAA can be effective: confidentiality. If the Federal Rules of Civil Procedure allow defendants all evidence material to the litigation, there is no way, short of amending those rules, that the U.S. can claim to keep that information from being disclosed. [280] The only answer is to expand the amount of information available through an AMAA to include grand jury testimony and pre-merger notifications. Grand jury information is already supplied to state attorney generals under the low-level, "disclosing of a crime" standard. [281] U.S. companies ardently protested including pre-merger notifications in the IAEAA, but without this information there may be no reason for a nation to engage in an AMAA.

The reason such information was left out is similar to including the "public interest" provision in the IAEAA. It violates the concept of reciprocity that the IAEAA was supposed to champion. The FTC and DOJ can discount a request simply because they feel its motivation is based on a nation's trade policy. If one of the agencies deny the request on those grounds, the slighted party would deny future U.S. requests on the same ground, and many times they would be correct. The theory these points were based on, reciprocity for only short-term use, ignores the strides the U.S. has made in financial law, particularly in disclosure through the MJDS, toward using disclosure to harmonize conflicting standards.

If some base procedural and substantive harmonization does not occur, the IAEAA will remain useless save to nations like Australia and Canada who are not real trade rivals to the U.S. and not major players in the expanding economy. The U.S. may well have been using the IAEAA as a concession to block the formation of a strict international code with "minimum" standards. However, in the area of financial law, the U.S. has agreed to the establishment of minimum standards in regulating financial institutions, a step even the U.S. viewed as essential to strengthen

280. *See* IAEAA § 5(1).

281. Freeman, *supra* note 193 and accompanying text.

the confidence and integrity in the international financial system.

The U.S.'s OECD proposal for convergence on some cartel rules is a step in the right direction.[i] The U.S. reluctance to pursue insider trading standards in the IOSCO is not. U.S. regulators pursue harmonization, whether it be in securities regulation or banking, when it benefits the nation, but discounts it when harmonization hurts our local economy, as in antitrust or insider trading. This contradictory policy fails to understand the growth of a global economy where all markets are interconnected. International cooperation is intensifying in most financial law areas, but not in antitrust law. Since the progress in financial law may just be a game of catch-up to market innovations, the U.S. reluctance to move on antitrust law is dangerous for its economy.

CONCLUSION

The FTC and DOJ need to reject the extraterritorial approach articulated in the Guidelines and shakily upheld in the courts. It is a doctrine created in the early 1940s when our economy was in shambles and needed protection from companies whose nations had virtually no substantive antitrust laws. The doctrine ignores the internationalization of markets and the decrease in importance of boundaries over the past 60 years. The result will be even more cases like the Boeing-McDonnell Douglas Corp. merger where companies face competing nations whose interests they must satisfy. This will hamper smooth transitions in mergers and the ability of other companies accused of being monopolists or part of a cartel from competing efficiently in the global market. Some agreement must be made in substantive and procedural areas of antitrust law to allow for joint prosecutions of violators whose ill effects reach across boundaries. The same reasoning for U.S. participation in the Basle Committee and the IOSCO must be applied to antitrust law. Until that time, the IAEAA will remain an ineffective trade policy ploy, and the economy will suffer the consequences.
